

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY SHARBUTT)	
Claimant)	
VS.)	
)	Docket No. 181,486
ACE ELECTRIC COMPANY)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant filed an Application for Review by Appeals Board of an Award entered by Administrative Law Judge John D. Clark dated February 23, 1996. The Appeals Board heard oral argument by telephone conference on July 18, 1996.

APPEARANCES

Claimant appeared by her attorney, Timothy A. Short, appearing for Fred Spigarelli of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Garry W. Lassman of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Blake Hudson, appearing for Leigh G. Hudson of Fort Scott, Kansas. There were no other appearances.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award. Additionally, the respondent and the Kansas Workers Compensation Fund (Fund) had entered into an agreement filed in this matter on January 25, 1996, wherein the Fund agreed to pay 25 percent of the award and costs, if the date of accident was found to be after 1991. The parties also stipulated that claimant served written claim on the respondent on August 18, 1993.

RECORD

The Appeals Board considered the record listed in the Award. The file also contained the medical records of Daniel L. Dagen, D.O., filed as a joint-stipulation of the parties on September 20, 1994, and the medical records of . H.S. Majzoub, M.D., filed as a joint-stipulation dated September 13, 1994. The Administrative Law Judge also failed to list, as part of the record in this case, the deposition of John G. Esch, M.D., taken on behalf of the respondent on September 7, 1994. The parties have agreed that this deposition should be made part of the record of the case and the Appeals Board should consider the deposition in its review.

ISSUES

The following issues were contained in claimant's Application for Review by Appeals Board:

- (1) The date claimant suffered an accidental injury.
- (2) The nature and extent of claimant's disability.

At oral argument, respondent requested Appeals Board review of the following additional issues:

- (3) Whether claimant suffered an accidental injury that arose out of and in the course of her employment with the respondent on one specific occasion in May 1991 or during repetitive traumas occurring from May 1991 through July 9, 1993.
- (4) Whether claimant gave timely notice of her accident to respondent.
- (5) Whether claimant served respondent with timely written claim for compensation.
- (6) Whether claimant is entitled to unauthorized and future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1)(3) The most important and crucial issue that was decided in this case by the Administrative Law Judge and is now before the Appeals Board for review is the appropriate date claimant suffered an accidental injury while working for the respondent. The Administrative Law Judge found claimant's date of accident was July 9, 1993, the date claimant testified she was forced to leave work because she no longer could perform her job duties as a result of increasing symptoms in her left upper extremity, left shoulder, and back. Respondent argued that claimant established she was injured on one specific occasion when she caught her left arm in the taping machine she was operating in May 1991. Respondent asserted claimant had failed to prove she suffered micro-trauma repetitive injuries over a period from 1991 through her last day worked of July 9, 1993. Accordingly, the respondent concluded that the appropriate date of accident for the determination of workers compensation benefits for the claimant was May 1991. Conversely, claimant argued she suffered repetitive trauma while performing her work duties for the respondent from the initial incident that occurred in May 1991 until June 30, 1993. Therefore, claimant contended the appropriate date of her accident for workers compensation purposes was June 30, 1993.

Claimant verified through her testimony she sustained an injury to her left arm in May 1991 when it was caught in the taping machine. However, claimant further testified that following the incident her symptoms worsened as she performed her regular work activities to the point she could no longer perform her job duties because of the pain on July 9, 1993. Bernard Abrams, M.D., a neurologist in Kansas City, Missouri, examined the claimant at her attorney's request on September 29, 1993. Dr. Abrams diagnosed claimant's condition as overuse syndrome of the left arm. Based on the job duties described to him by the claimant, Dr. Abrams opined claimant's injuries were directly related to repetitive trauma from her work activities.

The Administrative Law Judge, in determining the appropriate date of accident in this case was claimant's last day worked, cited both the cases of Berry v. Boeing Military Airplanes, 20 Kan. App. 220, 885 P. 2d 1261 (1994), and Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). In Berry, the court held that the date of accident in a workers compensation case involving carpal tunnel syndrome is the last date on which claimant works and is required to stop working as a direct result of claimant's pain and disability resulting from carpal tunnel syndrome. 20 Kan. App. 2d 220, Syl. ¶ 3. The Berry case is cited in Condon as persuasive although claimant's injuries in Condon were not carpal tunnel syndrome. The court in Condon held that since the claimant's injuries were described as micro-trauma injuries occurring over a period of time, the condition was virtually the same, for workers compensation purposes, as carpal tunnel syndrome. 21 Kan. App. 2d 580, Syl. ¶ 1. In this case, the Administrative Law Judge found claimant's

injuries were caused by micro-traumas occurring over a period of time and, therefore, the appropriate date of accident was July 9, 1993, the last day claimant worked before she was forced to quit her job because of her injury. The Appeals Board agrees with the Administrative Law Judge and affirms that finding.

(2) The Administrative Law Judge found respondent had actual knowledge of claimant's injuries, thereby, satisfying the notice requirements set forth in K.S.A. 44-520. The Appeals Board also affirms that finding. The Appeals Board finds the record established that the respondent provided medical treatment for claimant's work-related injuries prior to and subsequent to her leaving the employment of the respondent. Claimant further testified that she notified respondent of her work-related injuries and that testimony was not contradicted.

(4) As previously noted, the parties stipulated that claimant served a written claim on the respondent for workers compensation benefits on August 18, 1993. Therefore, having found claimant's accident date to be July 9, 1993, the Appeals Board affirms the Administrative Law Judge's finding that claimant served a written claim upon the respondent within 200 days from the date of her accident pursuant to K.S.A. 44-520a.

(5) The Administrative Law Judge found claimant had sustained a 5 percent permanent partial disability of the left upper extremity, including the shoulder structure, as provided in the scheduled injury statute found at K.S.A. 44-510d(a)(13). Claimant argued that her work-related accident occurred prior to July 1, 1993, and, therefore, her injury, which extended into the shoulder was not a scheduled injury but was a whole body injury which made claimant eligible for work disability pursuant to K.S.A. 1992 Supp. 44-510e(a). On the other hand, respondent argued that if claimant's injuries were found to be repetitive trauma-type injuries occurring over a period of time, then claimant was limited to an injury to her upper extremity including the shoulder structure, which is a scheduled injury, as provided for in K.S.A. 44-510d(a)(13). Since claimant's date of accident was found to be July 9, 1993, the Appeals Board affirms the Administrative Law Judge's finding the claimant's disability is limited to a scheduled injury.

Only one physician expressed an opinion on the question of what, if any, permanent functional impairment claimant suffered as a result of her work-related injury. As previously noted, claimant was examined at claimant's attorney's request by Bernard Abrams, M.D., a neurologist in Kansas City, Missouri. After examining the claimant, reviewing her previous medical records, and her diagnostic tests, Dr. Abrams opined claimant had suffered a 5 percent permanent partial impairment to her left upper extremity at the shoulder caused by repetitive trauma from her work activities. Dr. Abrams also permanently restricted claimant from using her left upper extremity repetitively, forcefully grasping, twisting, or reaching overhead. Based on Dr. Abrams uncontradicted opinion, the Appeals Board affirms the Administrative Law Judge's finding that claimant was entitled to permanent partial general disability benefits based on 5 percent permanent functional impairment of the left upper extremity including the shoulder.

(6) The Administrative Law Judge ordered the respondent to pay unauthorized medical expenses to the statutory limit and future medical upon proper application to and approval by the Director. The Appeals Board finds those orders are appropriate and, therefore, should be and are affirmed.

The Appeals Board finds the findings of fact and conclusions of law of the Administrative Law Judge that are set forth in the Award are accurate and appropriate. These findings and conclusions are adopted by the Appeals Board as its own as if specifically stated herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated February 23, 1996, should be, and hereby is, affirmed and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant Nancy Sharbutt, and against the respondent, Ace Electric Company, a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on July 9, 1993, and based upon an average weekly wage of \$295.

Claimant is entitled to 4 weeks of temporary total disability compensation at the rate of \$196.68 per week or \$786.72, followed by 11.05 weeks of permanent partial disability compensation at the rate of \$196.68 per week or \$2,173.31, for a 5% permanent partial disability of the left upper extremity including the shoulder structure, making a total award of \$2,960.03, which is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

The Kansas Workers Compensation Fund, in accordance with the agreement entered into by the Fund and the respondent, is ordered to pay 25% of the award and costs.

Claimant is entitled to unauthorized medical expenses upon proper presentation of the expenses up to the statutory limit.

Future medical may be considered upon proper application to and approval by the Director.

All other orders of the Administrative Law Judge in the Award are incorporated and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Fred Spigarelli, Pittsburg, KS
Garry W. Lassman, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director